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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 532

THE UNITED STATES GRAPHITE COMPANY, PETITIONER

v.

CHARLES SAWYER, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 87-92) is reported at 71 F. Supp. 944. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit, affirming the opinion below (R. 105), is reported at 176 F. 2d 868.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1949 (R. 111). A peti-

tion for rehearing *in banc,* filed on March 11, 1949 (R. 112), was denied on October 13, 1949 (R. 122). The petition for writ of certiorari was filed on January 9, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

On October 8, 1940, Congress enacted Section 124 of the Internal Revenue Code which provides that taxpayers who build emergency facilities certified by the Secretaries of War or the Navy as essential to the expansion of the nation's rearmament program may elect to deduct amortization of the cost of those facilities as a federal tax deduction over five years. On May 9, 1944, petitioner applied to the War Production Board, as successor to the Secretaries of War and the Navy, for a necessity certificate covering machinery already acquired and to be thereafter acquired. On July 17, 1944, the War Production Board, acting in accordance with policies set forth in pertinent Executive Orders and Regulations promulgated under Section 124, declined certification of machinery acquired prior to that date and granted certification of 35 per cent of the cost of machinery thereafter to be acquired. In this proceeding, petitioner seeks mandatory orders to compel respondent, as successor to the War Production Board,[1] to certify 100 per cent of the cost of the

[1] Respondent's predecessors were, in the order named, as follows: Temporary Controls Administrator, Civilian Production Administrator, Chairman of the War Production Board.

machinery denied certification and 100 per cent of the cost of the machinery which was certified as to 35 per cent of its cost. The question presented is whether both courts below erred in refusing to compel a different treatment of petitioner's application by the issuance of mandatory orders.

STATUTE AND REGULATIONS INVOLVED

Section 124 of the Internal Revenue Code, 26 U.S.C. 124, and the Executive Orders and Regulations issued thereunder are set forth in pertinent part in the Appendix, *infra,* pp. 23-29.

STATEMENT

On July 17, 1944, the War Production Board, pursuant to Executive Orders and to its Regulations (Appendix, *infra,* pp. 26-29), promulgated under Section 124 of the Internal Revenue Code, issued to petitioner a percentage necessity certificate authorizing the amortization of 35 per cent of the cost of certain facilities, thereafter to be acquired, as a tax deduction over a period of five years (R. 17). Certification was denied facilities acquired by petitioner prior to July 17, 1944 (R. 35). This action, brought on September 9, 1946, attacks the validity of the Executive Orders and Regulations and prays that respondent be ordered to issue necessity certificates for 100 per cent of the cost of all facilities procured be-

(Executive Order 9841, April 23, 1947, 12 F. R. 2645; Executive Order 9809, December 12, 1946, 11 F. R. 14281; Executive Order 9638, October 4, 1945, 10 F. R. 12591; Executive Order 9406, December 17, 1943, 8 F. R. 16955.)

tween December 28, 1943, and December 15, 1944.

In opposition to this application for mandamus, respondent filed motions to dismiss and for summary judgment (R. 41, 87), supported by the affidavit of Sidney T. Thomas, Chief of the Tax Amortization Branch, Civilian Production Administration (R. 41-52).[2] On June 27, 1947, the District Court for the District of Columbia granted respondent's motion for summary judgment on the ground that respondent's construction of Section 124 was reasonable and could not be set aside in this action for mandamus (R. 91-92). A majority of the Court of Appeals for the District of Columbia Circuit (Edgerton and Clark, JJ.) affirmed *per curiam* on the opinion below, with Judge Wilbur K. Miller dissenting, on February 28, 1949 (R. 111). A petition for rehearing *in banc* was denied on October 13, 1949 (R. 122).

A brief summary of the purposes and administration of Section 124 is necessary for an understanding of the issues raised herein. At the beginning of the war emergency in 1940, the officials in charge were faced with the problem of financing the additional production capacity which was critical to the rearmament program. Two alternatives were available—government ownership of

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[2] Mr. Thomas was, during the period here involved, Acting Chief of the Tax Amortization Branch, War Production Board. The substance of the affidavit is derived in part from a report, dated February 15, 1945, by the then Under Secretary of War, Robert P. Patterson, to the Secretary of War on the administration of Section 124 (R. 52-79).

the expanded facilities,[3] or private financing. As to the second source of capital "for part of the needed expansion" (R. 53), it was found that industry was reluctant to risk capital in a program of plant expansion and conversion which might not be operative long enough to repay the cost of facilities having limited use if the usual rate of amortization for taxation were employed (R. 42).

To overcome this obstacle, Congress, on October 8, 1940, enacted Section 124 of the Internal Revenue Code as part of the Second Revenue Act of 1940. 54 Stat. 998. Section 124 estimated the probable duration of the emergency at five years, and allowed taxpayers, who built emergency facilities certified as essential by the Secretaries of War or the Navy,[4] the election of deducting amortization of the adjusted basis of an emergency facility over a period of sixty months. Section 124(a). Certification was to be under regulations prescribed by the Secretaries of War and the Navy with the approval of the President. Section 124(f)(1). The amortization period could be

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[3] The Government, acting through Reconstruction Finance Corporation and Defense Plants Corporation, constructed and owned many emergency facilities. In other instances, contracts were executed which provided that the taxpayer would expend its own funds for the construction of new facilities and would be reimbursed by the Government over a period of sixty months, title being transferred to the Government at the termination of the contract.

[4] As enacted, certification was to be made jointly by the National Defense Advisory Commission and the Secretaries of War or the Navy. The Commission's certifying authority was terminated by Joint Resolution of October 30, 1941, 55 Stat. 757.

terminated by Presidential proclamation of the end of the emergency, or by certification by the Secretaries of War or the Navy to the Commissioner of Internal Revenue that an emergency facility ceased to be necessary in the interest of national defense. Section 124(d)(1).

A detailed description of the successful administration of Section 124 as part of the plant expansion program is set forth in the Thomas affidavit and Patterson report (R. 41-79). Facilities valued at approximately five billion dollars were certified under Army and Navy administration (R. 75-76). For the purpose of this proceeding, it is only important to note the changes in policy and application made necessary by developments in rearmament needs. By the Spring of 1943, it had become apparent that the chief limiting factor in war production no longer was plant capacity but materials and manpower. Maximum war production now required, not an encouragement of facility expansion, but a curbing of it. Up to that time, almost as much effort had been devoted to the construction of necessary facilities as to the actual production of arms and munitions. (R. 72-73).

Concluding that "the need for amortization as an inducement to the private financing of such facilities had come practically to an end" (R. 77), the War Department, on June 25, 1943, requested the advice of the Office of War Mobilization. After full consideration, the Director of War

Mobilization directed the War and Navy Departments to discontinue certification but suggested that the issuance of certificates for facilities for military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion (R. 74). Accordingly, an amendment to the Regulations was approved by the President on October 5, 1943 (8 F. R. 13824).[5] It provided that, with the exception of facilities contracted for before the date of the amendment, no facility could be considered for certification unless the certificate was issued before the facility was acquired. Appendix, *infra,* p. 25. It also provided that further certification would be made only in cases of a shortage of facilities or supplies required for military or naval uses, and then only after consideration of the relative advantages of government financing and private financing with amortization (R. 74; Appendix, *infra,* p. 26). Simultaneously, the technical services of the War Department were advised that, where additional facilities were required and private companies which could provide them were unwilling to finance them without amortization, arrangements should be made for government financing (R. 74). The "* * * clear intention was to obtain substantial termination of the issuance of certificates" (R. 46).

[5] It should be noted that, contrary to petitioner's statements (Pet. 6, 27), this change in policy, and the issuance of regulations which embodied it, antedated the transfer of the certification function to the War Production Board.

This basic change in the administration of Section 124 was widely publicized, appeared in the Federal Register, and copies of the amendment to the regulations were sent to all taxpayers who had previously filed applications, including petitioner (R. 46; and see fns. 7, 10, *infra,* pp. 9, 12).

On December 17, 1943, the power to issue necessity certificates in all future cases was transferred by Executive Order 9406 (8 F. R. 16955) from the Secretaries of War and the Navy to the Chairman of the War Production Board. See R. 73-75. On the same date, the President approved regulations prescribed by the Chairman of the War Production Board which, in so far as the issues herein are concerned, were the same as the above-described Army-Navy regulations issued on Octobed 5, 1943 (R. 46-47; Appendix, *infra,* p. 27; 8 F. R. 16964). Both Executive Order and Regulations specified that necessity certificates should not be issued unless the Chairman of the War Production Board determined prior to the beginning of construction or date of acquisition (1) that the facilities are clearly necessary for the war effort, and (2) that it is to the advantage of the Government that the facilities be privately financed (R. 46-47).[6]

Thus, the decision on which the issuance of a necessity certificate was based required considera-

[6] These principles were repeated in Executive Order 9429 (9 F. R. 2487) on March 2, 1944, and in the Amended Regulations of the War Production Board of March 2, 1944 (9 F. R. 2492) (Appendix, *infra,* pp. 27-29).

tion of complex factors. More careful recognition of the relative advantage of public ownership and private financing under Section 124, now made possible by achieved plant expansion, was required by the ever increasing impact of the amortization privilege on the revenue structure (R. 45). Amortization, an abnormal tax deduction, involved a loss of revenue to the Government which, in the case of companies in the higher tax brackets, might amount to 81% of the cost of the facilities (R. 80, 85). And if the facilities concerned could reasonably be considered useful after the war to the applicant in his regular business, or to anyone else, the Government, if it financed the facilities, would be able to recoup a part of its cost by sale or other disposition after the war (R. 48).

To implement the Presidential directive that necessity certificates would thereafter be issued only where it was to the advantage of the Government that the facilities in question be privately financed, a memorandum was prepared by the Tax Amortization Branch, War Production Board on February 9, 1944, to control processing of applications.[7] The memorandum advised that (R. 80):

* * * * *

> In determining whether it is to the advantage of the Government that the facilities

[7] As shown above, pp. 7-8, the Executive Orders and regulations issued pursuant thereto, here in issue, were duly published in the Federal Register. Memoranda and circulars

be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.[8]

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issued for the guidance of Government officials in processing applications for the amortization privilege under Section 124 were, of course, matters of internal management and Federal Register publication was not required. It should be noted that the amortization program under Section 124 was terminated, on September 29, 1945, prior to the effective date of the Administrative Procedure Act, 5 U.S.C. 1011. See Proclamation No. 2669, 10 F. R. 12475.

[8] A circular dated March 8, 1944, approved by J. A. Krug, then Vice-Chairman of the War Production Board, set forth, the following criteria for preparation of recommendations for necessity certificates (R. 84):

* * * * *

.02 In the event that amortization should be allowed,

After surveys of current and pre-war costs of many types of facilities, the basic standard for partial certification was fixed at 35 per cent of current costs. Departure from this figure, when justified by evidence, was authorized and partial certification in fact ranged from 20 per cent to 80 per cent (R. 49, 51).[9]

On May 29, 1944, after the foregoing principles had been established, petitioner applied to the War Production Board for a necessity certificate

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determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

3. Partial certificate will be given in appropriate percentages under certain other circumstances of an ~~ordinary~~ extraordinary nature. The following are examples:

a. When part of the facilities are appropriate for government financing and part for a 100% certificate, a percentage certificate may be issued for the entire project at a percentage which will result in same amount of tax amortization that would have been allowed had the individual items been considered separately.

* * * * *

[9] These general principles and policies were applied to 11,435 applications for necessity certificates by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were totally denied, and 1,422 were withdrawn. In approximate dollar value, the total amount covered by applications for certificates was $1,498,730,000. Of this amount, $701,163,000 was approved and $797,567,000 was denied (R. 51).

for facilities for its new plant.[10] At various dates from October 21, 1943, to December 16, 1943, priorities had been granted by the War Production Board for the purchase of such facilities,[11] and acquisition and installation had began on December 28, 1943. Procurement of the facilities was completed on December 15, 1944 (R. 13).

On July 17, 1944, the War Production Board sent to petitioner a "Letter of Predetermination" which stated, in accordance with the Executive Orders and Regulations, that facilities acquired subsequent to the date of the letter were eligible for tax amortization on a 35 per cent basis (R. 35). After petitioner filed an affidavit showing

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[10] In 1943, demand for Graphitar, a graphite product manufactured by petitioner for use in the fabrication of marine and aircraft engines, began to exceed the capacity of petitioner's plant and plans were made to more than double the plant capacity (R. 7). On June 27, 1943, petitioner filed an application under Section 124 with the Secretary of War for a necessity certificate for the cost of a new plant. On October 28, 1943, the Secretary of War issued a necessity certificate for 100 per cent of the cost of the plant (R. 11). A priority was granted on October 29, 1943, and petitioner began construction (R. 10).

The priority issued to petitioner was AA-3, but there were several priorities higher than this on the preference scale. It should be noted in this connection that the granting of priorities called for different considerations and for the application of different standards than those entering into the issuance of necessity certificates. The power to grant priorities was derived from an entirely separate law, the Second War Powers Act (50 U.S.C. App. 631), and was administered under different Executive Orders—No. 9040 (7 F. R. 527); No. 9125 (7 F. R. 2719); No. 9638 (10 F. R. 12591). The issuance of a priority was in no sense a determination of necessity within the meaning of Section 124. Countless items were acquired by virtue of priorities for which tax amortization would not have been and was not granted.

[11] See fn. 10, *supra*.

the cost of facilities acquired on or after July 17, 1944, the War Production Board, on August 1, 1944, issued petitioner a necessity certificate dated July 17, 1944. The certificate provided (R. 17):

> It Is Hereby Certified that the facilities described in the attached Appendix A (consisting of 9 pages)[12] are necessary in the interest of national defense during the emergency period, up to 35% of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, * * *.

On September 9, 1946, petitioner filed this suit, alleging that it was wrongfully denied amortization of $175,813.35. Of this amount, $77,195.99 represents facilities acquired prior to July 17, 1944, and $98,617.36 represents 65 per cent of the cost of facilities acquired after July 17, 1944 (R. 24). As indicated above, p. 4, both courts below declined to issue the requested orders.

ARGUMENT

In this proceeding for mandamus, petitioner seeks to compel respondent, in his official capacity (R. 1), to do two things: (1) to issue a certificate for 100 per cent of the cost of facilities as to which certification was denied; and (2) to issue a certificate for 100 per cent of the cost of facilities as to which only 35 per cent of the cost was certified.

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[12] Appendix A listed the facilities shown in petitioner's application for a certificate. Facilities designated as having been received before July 17, 1944, were crossed over in the form of an "X" by red pencil (R. 17).

Both courts below have held that respondent's refusal to grant such certificates is grounded upon a reasonable interpretation of respondent's discretionary powers under Section 124. The question raised herein, whether such reasonable exercise of discretion may be set aside by mandamus, is not novel and has uniformly been answered by this Court in the negative.[13] *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 577; *Carrick* v. *Lamar,* 116 U.S. 423, 426; *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324; *West* v. *Hitchcock,* 205 U.S. 80, 85; *Ness* v. *Fisher,* 223 U.S. 683, 691-692; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U.S. 549, 555; *Hall* v. *Payne,* 254 U.S. 343, 347; *Work* v. *Rives,* 267 U.S.175, 183; *Wilbur* v. *United States,* 281 U.S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.,* 287 U.S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.,* 294 U.S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering,* 301 U.S. 540, 543; *Adams* v. *Nagle,* 303 U.S. 532, 542.

The rule is precisely stated in *Wilbur* v. *United States, supra,* at pp. 218-219:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty,

[13] Whether this be called an action for an order in the nature of a writ of mandamus or for a mandatory injunction, is immaterial. In substance and effect a mandatory injunction is the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations. *Gaines* v. *Thompson,* 7 Wall. 347, 352; *Miguel* v. *McCarl,* 291 U.S. 442, 452; cf. *Warner Valley Stock Co.* v. *Smith,* 165 U.S. 28, 33.

> this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> * * * Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

And it applies with as much force to the construction of statutes as to the determination of questions of fact. *Decatur* v. *Paulding, supra; Ness* v. *Fisher, supra; Hall* v. *Payne, supra; Work* v. *Rives, supra.* Even if his construction of the statute be erroneous, mandamus will not issue to compel the administrative official to act upon one construction rather than another. The interpretation need only be reasonable. "Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought

the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." *Riverside Oil Co.* v. *Hitchcock, supra,* at pp. 324-325. And see *Work* v. *Rives, supra,* at 183; *Adams* v. *Nagle, supra,* at 542.

Accordingly, to obtain the relief which it here asks, petitioner must affirmatively demonstrate that the action taken by respondent's predecessors was completely arbitrary and devoid of authority under Section 124. The petition falls far short of the required showing. It discloses, at best, an alternative reading of Section 124 and the scope of administrative power thereunder—an inflexible reading which fits the needs of petitioner's case but which was rejected, as not corresponding either to the complex requirements of national rearmament or to the intent of Congress by all the responsible executive officials, including the President, who administered the plant expansion program, and by both courts below.[14]

In effect, petitioner reads Section 124 as if it

[14] In saying that all responsible executive officials concurred as to the proper interpretation and administration of Section 124 in so far as here under attack, *i.e.*, the changed policy of administration inaugurated by the Secretaries of War and Navy and followed by the War Production Board, we are not unmindful of petitioner's repeated insistence that a different view was taken by the Commissioner of Internal Revenue (Pet. 2-3, 9, 35-39). The administration of Section 124 and the power to issue war necessity certificates thereunder was not, in any way, delegated to or entrusted with the Commissioner of Internal Revenue. It was essential that the administration of Section 124 be in the same hands that controlled the complex and constantly changing needs of the overall war program. The Commissioner's sole function in the picture was

were a rigid contract between Congress and industry.[15] Petitioner ignores the vital control delegated by Congress to the Executive branch over the administration of Section 124, a control apparent in the terms of the act itself and underscored if the statute be placed, as it must be, in its proper setting. The entire expansion of needed plant capacity for the rearmament program might possibly have been accomplished through Government ownership of all facilities. A great part of our expanded plant capacity was publicly financed and constructed. However, in view of the need for haste, as the then Under Secretary of War Robert P. Patterson pointed out in his report to the Secretary of War on the administration of Section 124, we had to expand to the full "within the framework of the system of private enterprise, not only because that was the system in which we

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to prescribe the methods to be employed in preparing returns by taxpayers who had received war necessity certificates. However, if the Commissioner's views be considered relevant to the present case, it should be noted that his view accords with and recognizes the position taken by those officials who administered the amortization program. Section 29.124-6 of Treasury Regulation No. 111, quoted on page 63 of the petition, specifically recognizes partial certification for amortization purposes. This recognition of partial certification destroys petitioner's reliance on the Commissioner's regulation, as to the 35 per cent certificate here under attack. There is, of course, nothing in the Commissioner's regulations which gives aid or comfort to petitioner's other contention, namely, that the issuance of a war necessity certificate should be compelled where it was totally denied as to facilities acquired before the date of application.

[15] Petitioner does not contend that the actions of the respondent's predecessor were not authorized by the regulations then in effect. His contention is rather that the regulations were not authorized by the statute (R. 90-91).

believed, but also because it was the system we had" (R. 77-78). Therefore, for part of the needed expansion of capacity, it was thought desirable, particularly in view of the short-term and specialized nature of many of the projects, to encourage the investment of private capital by the grant of a tax privilege. Section 124 was enacted in 1940 to provide that encouragement and to supplement Government financing.

Section 124 was an emergency measure in a field "* * * full of technical and difficult detail * * *" (R. 77). In order that its objective might be achieved with protection against waste and abuse, Congress provided for a great deal of flexibility in its administration. The Secretaries of War and Navy, subject to the approval of the President, were given a rule-making power as to certification of facilities. Section 124(f)(1). Power to terminate the amortization privilege entirely or in particular cases, when warranted, was granted. Section 124(d)(1).

By the end of 1943, the character of the paramount needs of the rearmament program had changed. The critical factor no longer was additional plant capacity, but the utilization of existing capacity. In fact, there was need to curb and control expansion so as to channel men and resources into production. It was then both possible and necessary to give consideration to the ever-increasing impact of amortization upon the public revenue. As stated above, p. 6, approximately 5

billion dollars of expanded capacity was financed under the Section 124 privilege during the Army-Navy administration of the statute. Accordingly, the general amortization program was terminated except as to unusual and limited cases. To control and limit amortization effectively, Executive Orders and regulations were prescribed which directed that no facilities would be certified unless the certifying authority determined prior to the acquisition of the facilities that they were physically necessary and that it was to the advantage of the Government that they be privately financed under Section 124 rather than by the Government.[16] Applying these principles in the instant case, the War Production Board declined to certify facilities which had been acquired prior to any determination of necessity and certified that only 35 per cent of the cost of facilities thereafter to be acquired was necessary (R. 50). The Board found, as to the partially certified machinery, that it was likely to have a broad market and general value at the end of the war and be of use for normal peacetime production (R. 50).

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[16] If the facilities concerned could reasonably be considered useful after the war to the applicant in his regular business, or to anyone else, the Government, if it financed the facilities, would be able to recoup a part of its cost by sale or other disposition after the war. Thus, where the facilities had relatively little post-war value, it was in the best interests of the Government to grant a necessity certificate. On the other hand, it was to the Government's advantage that facilities with post-war value be publicly financed. Alternatively, it might be advantageous to the Government that facilities with post-war value be privately financed under less than 100 per cent of cost amortization. See R. 48 and 80.

The establishment of the above described policy and its application in this case was a reasonable exercise of discretionary powers necessarily granted to the certifying authorities and well within the scope of their rule-making and termination powers. On broad grounds, therefore, petitioner's challenge must fail.

The same result obtains if the petition be viewed more narrowly. Petitioner's fundamental contentions appear to be: (1) that petitioner has a right to file an application for a certificate within 6 months after the facilities have been acquired; and (2) that, as to facilities certified as necessary, petitioner has an automatic right to 100 per cent amortization of the cost of its facilities certified as necessary. In basing its prayer for mandatory orders on these contentions, petitioner overlooks the actual facts in the case. Assuming that petitioner had a right to file an application within six months after acquisition of the facilities, it could not compel favorable action on the application. There can be no doubt that certifying authorities exercised discretion in passing upon applications. Thus, as to its pre-acquired machinery never found to be necessary and as to which certification was declined, the order which petitioner seeks would not be one directing the performance of a "mere ministerial act." On the contrary, such an order would constitute certification by the court.

The same analysis applies to the machinery which was partially certified. Petitioner continu-

ally makes the incorrect assumption that such machinery was certified as necessary in its entirety, that the certification was improperly conditioned, and that the only remaining problem is to direct recognition of the 100 per cent amortization privilege which automatically flows from certification. The letter of predetermination and the certificate, the basic evidence as to the nature of the determination made, merely state that the machinery was necessary up to 35 per cent of its cost (R. 17, 35). There is nothing to indicate that any certification would have been made, had the certifying authorities been compelled to choose between 100 per cent or nothing. Again, an order changing the 35 per cent certificate to a 100 per cent certificate would not be a mere correction but would, in fact, be a certification by court order.

CONCLUSION

For the foregoing reasons, we submit that the petition should be denied.[17] We think it relevant to note the necessarily disruptive and unsettling result of petitioner's view, particularly in the budgetary and tax fields.[18] Cf. *Hurley* v. *Kincaid*,

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[17] *United States* v. *Milnor Corp.*, 85 F. Supp. 931 (E.D. Pa.) and *American Twist Drill Co.* 11 T. C. 200 (Pet. 17-19), are not in conflict with the instant case. Neither of these two cases involve the question whether mandamus would issue to review the decision of the certifying authority to require a predetermination of necessity and to grant only a partial certificate.

[18] The magnitude of reopening the amortization program cannot be over emphasized. Eleven thousand four hundred and thirty-five applications were received and considered by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were totally denied, and 1,422 were withdrawn. In approximate dollar value, the total

285 U.S. 95, 104; *Duncan Townsite Co.* v. *Lane*, 245 U.S. 308, 311-312; *Decatur* v. *Paulding*, 14 Pet. 497, 516. Force is added to this consideration by the fact that petitioner is requesting judicial intervention to obtain a tax concession, a matter of legislative grace in which courts have been traditionally reluctant to interfere with administrative determinations. *Williamsport Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502, 507; *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440; *Helvering* v. *Inter-Mountain Life Ins. Co.*, 294 U.S. 686, 689; *Welch* v. *Obispo Oil Co.*, 301 U.S. 190; *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596 (C.A. 9); and see *First Securities Corp.* v. *Clements*, 103 F. 2d 1011 (C.A. 6).

Respectfully submitted,

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FEBRUARY, 1950.

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amount covered by applications for certificates was $1,498,730,000. Of this amount, $701,163,000 were approved and $797,567,000 denied (R. 51). The reopening now of all these applications may well be an insurmountable undertaking. The Department of Commerce has dismissed all former Civilian Production Administration and War Production Board employees who were employed in the Tax Amortization Branches thereof and is now merely a custodian of the records.

APPENDIX

Section 124 of the Internal Revenue Code, 54 Stat. 998, as amended by the Act of October 21, 1942, 56 Stat. 798, 849-851, 26 U.S.C. 124, provides in pertinent part as follows:

(a) *General rule.* Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(d) *Termination of amortization period.*

(1) If the President has proclaimed the ending of the emergency period (as defined in subsection (e)), or if the Secretary of War or the Secretary of the Navy has, in accordance with regulations prescribed by the President, certified to the Commissioner that an emergency facility ceased, on the date specified in the certificate, to be necessary in the interest of national defense during the emergency period, and if the date of such proclamation or the date specified in such certificate occurs within sixty months from the beginning of the amortization period with respect to such emergency facility, then the taxpayer may elect (in accordance with paragraph (4) of this subsection) to terminate the amortization period with respect to such emergency facility as of the end of the month in which such proclamation was issued or in which occurred the date specified in such certificate, whichever is the earlier. In such case the amortization period with respect to such facility shall end with the end of such month in lieu of the end of the sixty-month period.

* * * * *

(f) *Determination of adjusted basis of emergency facility.* In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939,

as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, * * *

* * * * *

The relevant Executive Orders and Regulations approved by the President, which were issued under Section 124, provide in pertinent part as follows:

(1). 8 F.R. 13824 (October 5, 1943):

The Regulations governing the issuance of Necessity Certificates under Section 124(f) of the Internal Revenue Code, prescribed by the Secretary of War and the Secretary of the Navy, and approved by the President May 22, 1942, as amended (7 F.R. 4233), are amended as follows:

Add to paragraph 3a subparagraph, as follows:

(d) The construction, reconstruction, erection, installation, or acquisition of a facility

shall not be deemed necessary unless (1) the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of such facility, was prior to October 5, 1943; or (2) an application for a Necessity Certificate describing such facility was filed before October 5, 1943; or (3) the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and that it is to the advantage of the Government that additional facilities for such supply be privately financed.

(2). Executive Order 9406, 8 F.R. 16955 (December 17, 1943):

* * * * *

3.(b) In acting upon applications for Necessity Certificates filed on and after October 5, 1943, describing facilities the construction, reconstruction, erection, or installation of which was not begun or which were not acquired prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2) that it is to the advantage of the Govern-

ment that such additional facilities be privately financed.

* * * * *

(3). 8 F.R. 16964 (December 17, 1943):

The following regulations are hereby prescribed by the Chairman of the War Production Board, with the approval of the President, pursuant to the authority contained in Executive Order 9406, dated December 17, 1943.

* * * * *

(3)(c) * * *

(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

* * * * *

(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.

* * * * *

(4). Executive Order 9429, 9 F.R. 2487 (March 2, 1944):

* * * * *

3. (b) In acting upon applications for Necessity Certificates filed on and after October

5, 1943 describing facilities the construction, reconstruction, erection, or installation of which was not begun or which were not acquired prior to October 5, 1943, or for which the applicant had not made contracts for the construction, reconstruction, erection, installation or acquisition thereof prior to October 5, 1943, Necessity Certificates shall not be issued unless the Chairman of the War Production Board has determined prior to the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of the facilities (1) that the facilities to be constructed or acquired are clearly necessary for the war effort, and (2) that it is to the advantage of the Government that such additional facilities be privately financed.

* * * * *

(5). 9 F.R. 2492 (March 2, 1944):

The amended regulations (December 17, 1943) governing the issuance of Necessity Certificates under section 124(f) of the Internal Revenue Code (8 F.R. 16964) prescribed by the Chairman of the War Production Board with the approval of the President (*supra*) are amended as follows:

* * * * *

Section 4 is amended to read as follows:

(4) *Application must be filed and determination made before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisi-

tion of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.

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